United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
for
THE DISTRICT OF COLUMBIA CIRCUIT

18,782

REGINALD CARRELL

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

867

APPEAL FROM AN ORDER
OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. The first question is whether a convicted criminal defendant, seeking to docket an appeal, untimely due to alleged negligence of trial counsel, should be advised of his right to counsel at a judicial hearing ordered to resolve the allegation of trial counsel's negligence, pursuant to the Sixth Amendment of the United States Constitution and Rule 44 of the Federal Rules of Criminal Procedure, United States Code Annotated, Title 18.

2. The second question is whether the case of United States v. Robinson, 361 U.S. 220, conclusively precluded the filing of an untimely notice of appeal.

Table of Cases

Miscellaneous

* Cases primarily relied upon are marked by asterisks.

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REGINALD CARRELL

Appellant,

vs. No. 18,782

UNITED STATES OF AMERICA

Appellee.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked under §§ 1291 and 1915(a) of Title 28 of the United States Code, and pursuant to an order of this Court dated June 30, 1964.

STATEMENT OF THE CASE

On November 30, 1962, the appellant herein was convicted in the District Court for the District of Columbia of the crime of Rape, (Criminal No. 321-62) along with three named co-defendants. A timely appeal was not filed on behalf of the appellant herein. The three co-defendants did file timely appeals and this Court has affirmed the conviction of two,

and reversed the conviction of one of the co-defendants. (Franklin vs. United States, - App. D.C. - 336 F. 2d 205).

On February 14, 1964, the appellant herein filed in the District Court a Motion for Leave to File a Notice of Appeal after the Expiration of the Timed Fixed Therefor. He claimed therein that within the specified time for noting appeals, he instructed his trial counsel to file an appeal, that his trial counsel failed to do so, and that he, the appellant, was unaware of this failure. The Court denied the motion on the basis of United States vs. Robinson, 361 U.S. 220.

On March 3, 1964, the appellant herein attempted to appeal to this Court from the District Court's denial to grant leave to take an appeal after the expiration of the specified time. On June 4, 1964, this Court remanded the case to the District Court for a hearing on the defendant's motion for an extension of time to file his application for a notice of appeal in forma pauperis, specifically, to determine whether or not the appellant's allegation of trial counsel's negligence in failing to file a notice of appeal, was well-founded. On June 8, 1964 the hearing was held before Judge Alexander Holtzoff. However, the appellant appeared in proper person without the benefit of counsel or knowledge of the purpose of the hearing. Appellant's trial counsel, William B. Bryant, Esquire, and Theodore R. Newman, Esquire, were present, although not in a representative capacity. On June 15, 1964, Judge Holtzoff submitted a written memorandum denying the motion of the appellant for an extension of time in which to file an application for notice of appeal in forma pauperis.

On June 26, 1964, appellant filed another application for leave to proceed on appeal in forma pauperis alleging that he was deprived of his right to counsel at the June 8, 1964 hearing before Judge Holtzoff, and that therefore, the June 15, 1964 order should be vacated and the case remanded for a rehearing; on June 30, 1964, the appellant was granted leave to proceed on appeal in forma pauperis from the June 30, 1964 order which denied the appellant's motion for an extension of time in which to file an appeal from the judgment of conviction.

STATEMENT OF POINTS

1. The appellant herein was not afforded the opportunity to be represented by counsel at the June 8, 1964 hearing before Judge Holtzoff, hearing ordered by this court to determine whether appellant's trial counsel had been negligent in failing to file a timely notice of appeal.

With respect to Point (1.), appellant desires the court to read the following pages of the Reporter's Transcript of Proceedings of June 8, 1964: Transcript, pp. 3-5, inclusive.

2. The appellant possessed insufficient intelligence and insufficient notice of the hearing to adequately present his case.

With respect to Point (2.), appellant desires the court to read the following pages of the Reporter's Transcript of Proceedings of June 8, 1964: Transcript, pp. 3-5, inclusive.

3. The appellant's mother should have been called to testify and would have been called to testify if the appellant had been afforded the opportunity to be represented by counsel.

With respect to Point (3.), appellant desires the court to read the following pages of the Reporter's Transcript of Proceedings of June 8, 1964: Transcript, pp. 10, 12, 13, 18, 21, 22.

4. Failure to afford the appellant the opportunity to be represented by counsel at the hearing, greatly prejudiced the appellant's effort to obtain leave to file a notice of appeal in forma pauperis.

With respect to Point (4.), appellant desires the court to read the following pages of the Reporter's Transcript of Proceedings of June 8, 1964: Transcript, pp. 1-26, inclusive.

SUMMARY OF ARGUMENT

The appellant herein filed in the Court of Appeals an Application for Leave to File a Notice of Appeal in forma pauperis and alleged therein that the failure to file a timely notice of appeal was due to the negligence of appellant's trial counsel. The Court of Appeals remanded the case to the District Court for the purpose of determining the allegation of trial counsel's negligence. At the hearing on this issue in the District Court, appellant was not afforded the opportunity to be represented by counsel.

It is submitted that the constitutional right to representation by counsel in criminal proceedings necessarily applies to a judicial hearing ordered to determine ultimately the granting of leave to file an untimely notice of appeal. There is no justifiable reason for distinguishing such a hearing from other stages of a criminal case. The issue presented at the hearing was a vital one, directly affecting appellant's right to appeal; testimony was taken, cross-examination of witnesses was necessary, and knowledge of the law was essential.

Rule 44 of the Federal Rules of Criminal Procedure, Title 18, USCA, states unequivocally that if a defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel. In the present case, the

appellant, a convicted criminal defendant, was not advised of his right to counsel at the hearing in question, and was not assigned counsel to represent him even though he was proceeding in forma pauperis; the opportunity to obtain counsel and even the opportunity to elect to proceed without counsel was not afforded appellant even though the suggestion was made to the bench by appellant's trial counsel, who was present at the hearing although not in a representative capacity. Furthermore, the appellant was not informed prior to the date of the hearing of the nature of the hearing, and stated in open court, at the beginning of the hearing, that he did not understand what was taking place. Also, the appellant, for the foregoing reasons, was unable to call witnesses on his own behalf, even though a wide range of testimony was elicited at the hearing, prior to a luncheon recess and again after the recess, concerning conversations between appellant's trial counsel and appellant's mother. It is submitted that the appellant was unaware of his right to call witnesses on his own behalf.

In a memorandum opinion filed after the hearing, the lower court found as a matter of fact that appellant's trial counsel was not negligent in failing to file a notice of appeal. The court then stated that the original motion to file an untimely appeal in forma pauperis was denied on the authority of United States v. Robinson, 361 U.S. 220, and that the same rationale should be applied once again. This case, however, is in no way

conclusive on the issue of the untimely filing of a notice of appeal due to trial counsel's negligence. Since the decision was rendered, two cases, one in the Seventh Circuit and one in the Ninth Circuit, have distinguished the case and held that the required appeal time limitation was not an absolute requirement.

Appellant should be granted a re-hearing on the issue of his trial counsel's negligence and afforded the opportunity to be represented by counsel.

ARGUMENT

The primary issue involved herein is whether a convicted criminal defendant is entitled to representation by counsel at a District Court hearing ordered by the Court of Appeals to determine whether the failure to file a notice of appeal was due to the negligence of the trial counsel. Although research has failed to uncover case law directly resolving this issue, it is submitted that the nature of the hearing involved herein, the compilation of case law on the general issue of right to counsel and the language contained in Rule 44 of the Federal Rules of Criminal Procedure, Title 18, USCA, all serve to substantiate the constitutional right to representation at such a hearing.

The appellant herein first filed a motion for leave to file a Notice of Appeal in forma pauperis on February 14, 1964; he had been convicted in

the trial court of the crime of rape, on November 30, 1962. In the motion, appellant alleged that the failure to note a timely appeal was due to his trial counsel's negligence, that he had instructed his trial counsel to note an appeal within the time allowed for such appeals, but that his trial counsel failed to do so. The District Court denied the motion on the authority of the United States v. Robinson, 361 U.S. 220.

The appellant then appealed from the order of denial and sought the aid of this court to obtain leave to file an untimely appeal in forma pauperis. He alleged once again that the failure to note a timely appeal was due to his trial counsel's negligence. On June 4, 1964, this court remanded the case to the District Court for hearing on the appellant's allegation of his trial counsel's negligence in failing to file a timely notice of appeal. This court ordered hearing was held on June 8, 1964, before Judge Alexander Holtzoff; at this hearing, the appellant appeared in proper person without the benefit of counsel or knowledge of the purpose of the hearing. Although appellant's trial counsel, William B. Bryant, Esquire, was present, he was not sitting in a representative capacity. However, Attorney Bryant immediately suggested to the court that the appellant be appointed counsel or be afforded the opportunity of retaining counsel for the purpose of the hearing. This suggestion was ignored, (Tr. of Proceedings, June 8, 1964, pp. 3-5), and the hearing began. Appellant first stated that he did not understand what was taking place, then was submitted to questioning by the

court, his trial counsel, and a United States Attorney. He attempted interrogation of his trial counsel at the suggestion of the court but called no witnesses on his own behalf. Subsequently, on June 15, 1964, the court submitted a written memorandum in which it found as a matter of fact that appellant's trial counsel was not negligent, and ordered that the attempted appeal was untimely. The appellant was then permitted an appeal in forma pauperis from that order on the grounds that he was not afforded the opportunity to be represented by counsel at the hearing.

The Supreme Court case of Johnson v. United States, 352 U.S. 565, 77 S. Ct. 550, 1 L. Ed. 2d 593, is closely analogous to the issue involved herein. In that case, an appeal in forma pauperis was contemplated by the appellant. However, the District Court certified that the appeal was not taken in good faith. The Supreme Court ruled that the certification by the District Court could be challenged by the petitioner seeking the appeal, and held further that:

> "... a Court of Appeals must, under Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 ALR 357, afford one who challenges that certification the aid of counsel unless he insists on being his own."

Clearly, the right to the aid of counsel in challenging the certification of a District Court that an appeal is not taken in good faith, should not be distinguished from the right to the aid of counsel in seeking to note an untimely appeal due to the negligence of trial counsel. In the Ninth

Circuti case of Anderson vs. Heinze (9th Cir. 1958) 258 F. 2d 479, the court said in discussing Johnson vs. United States, supra:

> "If this were an appeal from a conviction in Federal Court, there is no question but that Anderson would be entitled to such assistance as a matter of right. Johnson vs. United States, 352 U.S. 565, 77 S.Ct. 550, 1 L. Ed. 2d 593. The rationale of that decision is premised upon the fact that an appeal from a judgment of conviction is one step in the criminal proceedings. Since the Sixth Amendment entitles defendant in Federal criminal proceedings to the aid of counsel (Johnston v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L. Ed. 1461) that right ♦ extends to every phase of the appeal, including the preliminary phase of obtaining permission to appeal in forma pauperis. See in re Dinerstein, Ninth Circuit, 258 F. 2d 609; Gershon vs. United States, Eighth Circuit, 243 F. 2d 527, 530. " (Emphasis added)

The language contained in Rule 44 of the Federal Rules of Criminal Procedure, Title 18, USCA is particularly pertinent in this regard. That rule states:

> "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."

The dicta of this Court, in Edwards vs. United States, 78 U.S. App. D.C. 226, 139 F. 2d 365 (1944) fortifies the assertion that the filing of the notice of appeal is an integral part of a criminal defendant's defense.

In that case, this court stated:

> "The phrase 'every step of the proceedings' does not refer to mere lapses of time. It contemplates effective aid of counsel in the preparation and trial of the case. Powell vs. Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 77 L. Ed. 158, 84 ALR 527. It is true that denial, for a long time, of opportunity for conference and consultation with counsel, might result in a deprevation of the constitutional guarantee of assistance. Ordinarily this would be manifested by inadequate representation at the preliminary hearing, at the arraignment, during the progress of the trial, or in connection with the filing of notice of appeal, settling the bill of exceptions designating the record and of finding errors." (Emphasis added)

The necessity that counsel be appointed to represent the appellant in the present case and the prejudice to his case which resulted from the failure to afford him the opportunity of counsel is adequately substantiated in the June 8, 1964 Transcript of Proceedings. The appellant's trial counsel was present at the hearing, although not in a representative capacity; he immediately suggested to the court that the appellant should have the aid of counsel. The court refused. (p. 4) The appellant then stated that he did not understand the purpose of the hearing or what was expected of him. (pp. 4 and 5) Furthermore, prior to a luncheon recess, extensive testimony was heard concerning conversations between appellant's trial counsel and appellant's mother on the factual issue of whether or not trial counsel was instructed to note an appeal. After the luncheon recess, more testimony was heard concerning these conversations. If the appellant had been afforded the opportunity to be

represented by counsel, the appellant's mother would have been summoned to testify at the hearing concerning her conversations with appellant's trial counsel regarding the instruction to appeal. Knowledge of the law was essential but unavailable to the appellant.

It is clear upon the record that the appellant possessed insufficient intelligence and insufficient notice of the hearing to adequately present his case; it is also sufficiently clear that the appellant's mother should have been called to testify; these developments underscore the fact that the appellant was greatly prejudiced in his effort to obtain leave to file a notice of appeal.

In the memorandum opinion submitted after the hearing, the court discussed the case of United States vs. Robinson, 361 U.S. 220, and stated:

> "The foregoing findings of fact render academic the question of whether there is any remedy whatsoever in a case of a failure to file a notice of appeal in time even if the failure be due to the excusable neglect or specifically if the defendant instructed his counsel **within the prescribed time to file a notice of appeal,** but the latter failed to do so. It would seem that the opinion of the Supreme Court in the Robinson case is so unequivocal and far-reaching as to require a negative answer."

The Robinson case, however, is in no way conclusive on the issue of the untimely filingof a notice of appeal due to trial counsel's negligence. As the court's memorandum opinion states, since the decision was rendered, two cases, Calland vs. United States, (7th Cir.), 323 F. 2d 405, and Dodd vs. United States, (9th Cir.), 321 F. 2d 240, have distinguished the Robinson

case and have held that the required appeal time limitation was not an absolute requirement. Significantly, the cases dealt with derelictions of counsel.

CONCLUSION

Upon the foregoing argument, the appellant herein should be granted a rehearing on the allegation of his trial counsel's negligence in failing to note a timely appeal as instructed, and the appellant herein should be afforded the opportunity to be represented by counsel at the rehearing.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,782

REGINALD CARRELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
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FRANK Q. NEBEKER,
JOSEPH A. LOWTHER,
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Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Did the District Court have discretion whether to appoint counsel to represent appellant at a hearing conducted pursuant to this Court's mandate directing the District Court to determine whether appellant instructed his trial counsel to file a notice of appeal and whether his trial counsel told appellant he would file a notice of appeal?

2. Assuming the District Court had discretion as to the appointment of counsel, did the court abuse that discretion when it failed to appoint counsel to represent appellant at the hearing below?

3. Did appellant have the right to file a notice of appeal eleven months after his sentencing where the record shows that he discussed an appeal with his trial counsel who told him an appeal would be futile, that he did not tell his trial counsel to file a notice of appeal, and that his trial counsel did not tell him he would file a notice of appeal?

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,782

REGINALD CARRELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant and three others were convicted of rape by a jury sitting in the District Court before Judge Alexander Holtzoff. On January 10, 1963, appellant was sentenced to imprisonment for six to eighteen years.

Appellant did not file a notice of appeal following his conviction nor did he make any other attempt to appeal within the ten day period specified by Rule 37(a)(2).[1] However, on December 9, 1963, appellant filed "A Motion

[1] Appellant did file a letter in the nature of a motion for a reduction of sentence on January 19, 1963, which was denied.

for Extension of Time to File Application For 'Notice of Appeal In Forma Pauperis". In this motion appellant alleged that his trial counsel, William B. Bryant, had informed him "that he was going to file petitioner's 'notice of appeal'" but that Mr. Bryant had failed to file the notice.

Appellant's motion was denied by the District Court without a hearing "for lack of jurisdiction". An appeal was taken from this denial, and on June 5, 1964, this Court, in a *per curiam* order,[2] remanded the cause to the District Court:

> with directions to cause the production of petitioner in open court at a hearing, at which the court will require the attendance of petitioner's trial counsel and shall hear him, as well as petitioner, and any other competent evidence that may be offered relevant to the purpose of this remand. Upon the conclusion of such hearing, at which the Government as well as the petitioner may be represented by counsel, the District Court will make findings of fact and conclusions of law and thereupon enter a new final order on petitioner's motion for extension of time, based upon the record as supplemented by said findings and conclusions.

Pursuant to this mandate, a hearing was conducted before the District Court on June 8, 1964. At the outset of the hearing Mr. Bryant, who was present as a witness, suggested that counsel be appointed to represent appellant. The District Court replied, "No, I shall not appoint another counsel" (Tr. 4).[3]

Immediately thereafter, appellant was called upon to testify. As he began his testimony, appellant stated, "I don't quite understand what I'm supposed to be doing right now though. Your Honor, I don't quite understand

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[2] The order is reported at —— U.S. App. D.C. ——, 335 F.2d 687 (1964).

[3] "Tr." refers to the transcript of the hearing below which is filed in a separate volume, with the clerk of the court.

what I'm supposed to be doing right now at this time" (Tr. 5). The District Court replied, "I will tell you. You claimed that you told Mr. Bryant, who was your counsel at the trial, that you wanted to appeal. . . . And that he told you that he would appeal for you. Suppose you tell us in detail just what your conversations were with Mr. Bryant concerning this matter and when they took place" (Tr. 5).

Appellant then testified that after he was found guilty he told Mr. Bryant's assistant, Theodore R. Newman, to ask Mr. Bryant to "come over to the jail because I wanted to write an appeal", and that when he was sentenced he told Mr. Bryant that he "wanted to put in an appeal" to which Mr. Bryant replied "okay" (Tr. 5).

On cross-examination by Mr. Joseph A. Lowther, who represented the Government, appellant reiterated that he mentioned the subject of appeal to his counsel during the trial and again at sentencing, but he admitted that he said nothing about an appeal when, "about a month and a half after the trial", he was visited by Mr. Bryant at prison (Tr. 6-8, 9, 10, 13-15).

After appellant testified, Mr. Bryant and Mr. Newman took the stand. Mr. Bryant stated that he discussed the possibility of taking an appeal with appellant and with appellant's mother, that he told them an appeal would be useless, and that neither appellant nor his mother ever directed him to file a notice of appeal (Tr. 18-20).

Mr. Newman testified that he and Mr. Bryant discussed an appeal with appellant's mother for several hours, "and concluded by giving her our judgment that we could find no basis for filing a notice of appeal, for we found no error in the trial which would warrant reversal by the Court of Appeals . . . we specifically told her that she might want to consider talking to other counsel . . . that we found no basis for an appeal, and consequently did not intend to file such a notice" (Tr. 21-22).

After hearing the aforementioned testimony, the District Court stated that "neither Mr. Bryant nor his associate, Mr. Newman was ever instructed to take an appeal in this case. That being so, neither of them is guilty of any neglect in failing to take an appeal" (Tr. 25). On June 15, 1964, the District Court filed a memorandum, 231 F. Supp. 724, in which the Court amplified its findings.

On June 30, 1963, the District Court granted a motion by appellant for leave to appeal *in forma pauperis* from the aforesaid hearing. This appeal followed.

RULES INVOLVED

Rule 37(a)(2), Federal Rules of Criminal Procedure, provides:

> An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Rule 44, Federal Rules of Criminal Procedure, provides:

> If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

SUMMARY OF ARGUMENT

Under this Court's mandate, as well as applicable constitutional, statutory, and case law, the District Court had discretion whether to appoint counsel to represent appellant in this collateral proceeding. The issue before the District Court was very simple—did appellant direct his trial counsel to file a notice of appeal and did counsel tell appellant a notice of appeal would be filed. The District Court did not abuse its discretion when it decided that this issue could be resolved without the appointment of counsel to represent appellant.

The transcript of the hearing makes it plain beyond peradventure that appellant did not ask his trial counsel to file a notice of appeal, that counsel did not say a notice of appeal would be filed, and that appellant did not decide to seek an appeal until eleven months after his conviction. Appointment of counsel would, therefore, in no way have affected the finding of the District Court on the remand that, under *United States* v. *Robinson*, 361 U.S. 220 (1960), appellant has no right to a direct appeal now.

ARGUMENT

I. The District Court had discretion whether to appoint counsel to represent appellant at the hearing.

It is well established that an indigent is not entitled, as a matter of right, to have an attorney appointed to represent him at a habeas corpus or a 28 U.S.C. 2255 hearing. See, e.g., *Dorsey* v. *Gill*, 80 U.S. App. D.C. 9, 29, 148 F.2d 857, 877, *cert. denied*, 325 U.S. 890 (1945); *Dillon* v. *United States*, 307 F.2d 445 (C.A. 9, 1962); *United States* v. *Keller*, 284 F.2d 800 (C.A. 3, 1960); *United States* v. *Wilkins*, 281 F.2d 707 (C.A. 2, 1960); *Richardson* v. *United States*, 199 F.2d 333 (C.A. 10, 1952). But see, *United States* v. *Paglia*, 190 F.2d 445, 448 (C.A. 2, 1951).

Although appellant did not label his motion for leave to appeal "a petition under 28 U.S.C. 2255" the hearing below, was, for all practical purposes, a Section 2255 hearing. As in a Section 2255 case, appellant sought collateral relief eleven months after his conviction on the basis of his claim that he was denied effective representation of counsel. The root of the matter was whether failure of appellant's trial counsel to file a notice of appeal constituted ineffective representation. Adjudication of that issue is not essentially different from adjudication of the claim—often put forward in petitions under Section 2255—that trial counsel did not provide effective representation during the trial itself.

This action is essentially a Section 2255 proceeding for the further reason that the relief sought by petitioner would involve setting aside his sentence and resentencing him in order to initiate a new ten-day period in which to take an appeal. *Paulding* v. *United States*, —— U.S. App. D.C. ——, 335 F.2d 686 (1964). Thus, appellant is, in effect, attacking the validity of his sentence, as he would be doing in a more traditional Section 2255 case.[4]

In *Desmond* v. *United States*, 333 F.2d 378 (C.A. 1, 1964) (a Section 2255 case), it was also alleged that petitioner's trial counsel had failed to appeal, after telling petitioner that "he had filed all the necessary motions to afford me an appeal." In remanding the case for a hearing to consider this allegation the Court of Appeals said:

> "What form hearings of the sort required should take will depend upon the varying circumstances of particular cases. We shall not undertake to give specific directions except to suggest that in all probability counsel should ordinarily be appointed for the petitioner for relief unless, with knowledge that he can have counsel without cost, he prefers to proceed pro se . . ."

[4] See also, *Dodd* v. *United States*, 321 F.2d 240 (C.A. 9, 1963) in which a petition alleging the failure of trial counsel to note an appeal was treated as a Section 2255 petition.

The Court's statement that, "in all probability counsel should ordinarily be appointed for the petitioner", makes it clear that appellant (who stands in exactly the same shoes as did the petitioner in *Desmond*) had no absolute right to have counsel appointed at the hearing below.

Appellant suggests that he had a right to the appointment of counsel by virtue of the Sixth Amendment and Rule 44 of the Federal Rules of Criminal Procedure. But the Sixth Amendment and Rule 44 apply to criminal cases only, and a collateral proceeding of the kind involved herein is not criminal in nature. *Fay* v. *Noia*, 372 U.S. 391, 423 (1962); *United States* v. *Williamson*, 255 F.2d 512, 515 (C.A. 5, 1958), *cert. denied*, 358 U.S. 941 (1959).

Categorizing a collateral proceeding stemming from a criminal conviction as non-criminal may appear somewhat artificial.[5] However, the labeling of a collateral attack as non-criminal merely reflects the notorious fact that many, if not most, applications for collateral relief from criminal convictions are wholly frivolous. *Hodges* v. *United States*, 108 U.S. App. D.C. 375, 377, 282 F.2d 858, 860, (1960). For that reason, appointment of counsel in all such cases would often be a superfluity and might unduly burden the bench and the bar. This is particularly true where a claim of ineffective representation is made. Such claims rarely have merit. Moreover, appointment of counsel in such cases requires one member of the bar to attack another's ability, a result which should be avoided if possible.

Ordinarily counsel will be appointed to represent an indigent when a hearing is granted to consider his collateral attack. Counsel is not appointed as a matter of right, though, but to assist the Court in resolving the legal and factual issues raised by the petitioner. Whether those issues are such that the appointment of counsel

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[5] "The availability of a procedure to regain liberty through criminal process cannot be made contigent upon a choice of labels". *Smith* v. *Bennett*, 365 U.S. 708, 712 (1961).

is required lies within the discretion of the trial judge, to whom "the just and sound administration of the federal collateral remedies" is largely entrusted. *Sanders* v. *United States*, 373 U.S. 1, 18 (1963).

Where the issues in a collateral proceeding are complex or murky, or where for other reasons their resolution would be facilitated by the presence of counsel, counsel should be appointed. Indeed, the Due Process Clause of the Fifth Amendment may demand that an appointment be made. *Green* v. *United States*, 158 F. Supp. 804, 807 (D. Mass., 1958) (illuminating opinion by Judge Wyzanski). Where, on the other hand, the issues are obvious, the identity of the witnesses who should be called is clear, and the presentation of evidence will be simple, it is clearly within the discretion of the trial court not to assign counsel.[6]

Whether the words "petitioner may be represented by counsel" in this Court's mandate were intended to mean that appellant was to be represented by an attorney unless he waived counsel, or whether they were intended to mean that the District Court had discretion as to the appointment of counsel is not clear. If this Court had intended the appointment of counsel to be mandatory (absent waiver of counsel) presumably it would have said "petitioner shall be represented by counsel" or "petitioner shall be represented by counsel unless he waives counsel" or "petitioner must be represented by counsel".[7] In the absence of such mandatory language the District Court certainly was entitled to assume that this Court

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[6] The Court of Appeals for the Second Circuit has held that if "the petition for the writ presents a triable issue of fact the clear presentation of which requires an ability to organize factual data or to call witnesses and elicit testimony in a logical fashion it is much the better practice to assign counsel". *United States* v. *Wilkins*, 281 F.2d 707, 715 (C.A. 2, 1960).

[7] Contrast the language in the mandadte with the language in *Dodd* v. *United States*, 321 F.2d 240, 246 (C.A. 9, 1963) ("We assume that the trial judge, will appoint counsel for the appellant for the hearing to be held") and *United States* v. *Paglia*, 190 F.2d 445, 448 (C.A. 2, 1951) (". . . he must be represented by counsel").

did not intend a departure from the clearly established rule that the appointment of counsel in a collateral proceeding of this kind is discretionary.

II. The District Court did not abuse its discretion.

Since the District Court had discretion whether to appoint counsel to represent petitioner at the hearing (See Point I, *supra*), the issue on this appeal is not whether counsel should have been appointed as a matter of good practice, but whether the trial court abused its discretion.

There is no reason to believe that the presence of an attorney would have assisted the trial court in finding the relevant facts. Appellant's motion was short. It simply stated that Mr. Bryant told appellant he was going to file a notice of appeal and that Mr. Bryant did not file the notice. The only question thus before the District Court was whether in fact appellant had been told by Mr. Bryant that a notice of appeal would be filed and, under this Court's mandate, whether appellant directed Mr. Bryant to file a notice of appeal. The services of an attorney were not required to answer these questions.

As the Supreme Court has said in a different context (a Jencks Act case), "the inquiry being conducted by the judge was not an adversary proceeding in the nature of a trial controlled by rules governing the allocation between the parties of the burdens of proof or persuasion. The inquiry was simply a proceeding necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute." *Campbell* v. *United States*, 365 U.S. 85, 95 (1961).

The hearing below was conducted pursuant to the mandate of this Court ordering the District Court to determine particular facts. Such a hearing bears no relation to the trial of an accused. Unlike a trial on the merits, the issues at the hearing were simple and clearly framed, the identity of the persons to be called as witnesses was obvious, the scope of the examination of those witnesses was plain. No attorney was needed to marshall

facts, organize evidence, call witnesses, present testimony, or object to the admission of evidence.

The transcript shows that the District Court carefully adduced and considered all the relevant evidence pertaining to the allegations made by appellant. Appellant himself testified at the hearing as did his trial counsel, Mr. Bryant and Mr. Newman. The testimony of all three places beyond dispute the fact that, as found by the District Court, appellant never asked his trial counsel to file a notice of appeal and that counsel never said that a notice of appeal would be filed. Indeed, appellant's own testimony made this clear for at no time during the hearing did appellant ever claim that Mr. Bryant told him he was going to file a notice of appeal. Appellant merely testified that he mentioned his desire to appeal to counsel and that Mr. Bryant said "okay". Moreover, appellant testified that when Mr. Bryant visited him at prison some time after his conviction he did not mention the subject of appeal to Mr. Bryant, but rather discussed the possibility of his being transferred to another prison. If appellant had believed at that time that Mr. Bryant was pursuing an appeal for him it is inconceivable that he would not have mentioned the appeal during their conversation.

One has to wade deep into the waters of speculation to believe that the appointment of counsel would have made any difference in this case. Presumably counsel would have cross-examined Mr. Bryant and Mr. Newman. But the testimony of these two attorneys—both highly respected, well known members of the bar—was simple, straight forward, clear and consistent. Moreover their testimony was not contradicted by anything in the testimony of appellant himself. It is therefore inconceivable that the presence of an attorney to cross-examine fellow members of the bar would have altered the result below.

Appellant claims that his mother would have been called to testify if he had been represented by counsel. This claim is highly speculative and really nothing more than a makeweight. Appellant was notified that the hear-

ing was going to take place and he could have arranged for his mother's appearance. More importantly, appellant alleged that Mr. Bryant told him, not his mother, that an appeal was going to be taken.

There are cases in which a claim of ineffective representation of counsel requires the appointment of an attorney to represent the claimant. Considering the simplicity of the issues in this case, the outstanding reputation of appellant's counsel, the implausibility of appellant's tardy claim and the consistency of all the testimony, this was not such a case.

III. Petitioner has no right to appeal having failed to file a notice of appeal until eleven months after his conviction.

Although appellant's brief is devoted almost entirely to a discussion of his right to counsel at the hearing below it also raises the question of whether appellant is precluded from filing a notice of appeal under *United States* v. *Robinson*, 361 U.S. 220 (1961).

The *Robinson* case held, of course, that the ten-day period for filing a notice of appeal from a criminal conviction, promulgated by Rule 37(a)(2) of the Federal Rules of Criminal Procedure, is a mandatory, jurisdictional period which cannot be enlarged even where a notice of appeal is not filed in time because of excusable neglect.[8]

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[8] The inflexibility of the *Robinson* rule would be softened by an amendment to Rule 37(a)(2) proposed by the Advisory Committee on Appellate Rules in its "Proposed Federal Rules of Appellate Procedure". Proposed Rule 4(d) states that, ". . . Upon a showing of excusable neglect the district court may extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the original time prescribed by this subdivision."

See also, Rule 32(a)(2) of the "Second Preliminary Draft of Proposed Amendments to the Rules of Criminal Procedure", which provides that, "after imposing sentence in a case which has gone to trial, the Court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the costs of an appeal to apply for leave to appeal in forma pauperis. If the defendant

The record below establishes beyond any dispute that, as found by the District Court, appellant never instructed his trial counsel to file a notice of appeal and that counsel never told appellant they were going to so file (See Point II, *supra*). Appellant does not question these findings by the District Court. It is clear then that, although he expressed a tentative desire to appeal, appellant decided not to appeal after his attorneys explained to him and to his mother, that in their judgment there were no grounds for an appeal. That appellant knowingly waived his right to appeal is shown not only by the testimony of Mr. Bryant and Mr. Newman, but by the fact that appellant never mentioned the subject of appeal to Mr. Bryant when Mr. Bryant visited him at prison. It is also shown by the fact that appellant did not file his motion for leave to appeal until eleven months after his sentencing.

In view of these facts, appellant is in no better position than were the convicts in *Lewis* v. *United States*, 111 U.S. App. D.C. 13, 294 F.2d 209, *cert. denied*, 368 U.S. 949 (1961); *Watson* v. *United States*, 108 U.S. App. D.C. 256, 281 F.2d 619 (1960); and *Mitchell* v. *United States*, 103 U.S. App. D.C. 97, 254 F.2d 954, *cert. denied*, 371 U.S. 838 (1958).[9]

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so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant."

[9] *Mitchell* v. *United States, supra*, suggests that to succeed in this action petitioner would not only have to show derelictions by counsel but "plain reversible error at the trial". See also, *Dodd* v. *United States*, 321 F.2d 240 (C.A. 9, 1963), and *Calland* v. *United States*, 323 F.2d 405 (C.A. 7, 1963) (dissenting opinion). But see, *Desmond* v. *United States*, 333 F.2d 378 (C.A. 1, 1964) (Holding that if there were misconduct on the part of counsel in failing to note an appeal the burden would be on the Government to show that appellate relief would be futile). Whatever the rule may be in this jurisdiction, appellant has made no claim or showing of any kind that error was committed at his trial.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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